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REVIEW ARTICLE



The Ethics of Violence: Recent Literature on the Creation of the Contemporary Regime of Law and War

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ABSTRACT

This paper reviews a body of recent literature that interrogates the development and deployment of the contemporary regime of political violence. This literature includes Samuel Moyn's account of the emergence and dominance of the humanitarian paradigm and Francine Hirsch, Giovanni Mantilla and Boyd van Dijk's diplomatic histories of the creation of the central provisions of this paradigm. It also encompasses Dirk Moses, Benjamin Meiches and Sinja Graf's examinations of genocide and universal crime, Neve Gordon and Nicola Perugini's Human Shields, and Yagil Levy's *Whose Life is Worth More?* This is a diverse literature but, considered together, it traverses the creation of the legal categories, the cultural values and the ethical concerns that shape the current regime. It shows how these laws and values are created through political and cultural negotiations and how they become, themselves, political mechanisms that erase or legitimize certain forms of violence. By doing so, these works reveal the contingency and dangers of the current paradigm of ethical violence. They also, this review argues, show how difficult it is to escape from this paradigm.

KEYWORDS

Genocide; international humanitarian law; humanitarianism; political violence

War is a cultural artefact.¹ What constitutes war, who is allowed to wage war, which forms of violence are accepted, glorified or abhorred, are shaped within particular societies. The rules governing warfare reflect and reinforce the cultural conception of warfare.²

The contemporary ideal of acceptable warfare is a carefully regulated, humanitarian war.³ A good war should be carried out in a way that is “clean,” precise, sparing of civilians and even combatants.⁴ The purpose of war should be to protect the weak and control the violent. Genocide and crimes against humanity are the ultimate transgressions in this paradigm of warfare; humanitarianism and the protection of civilians are the best justifications.

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¹ John A. Keegan, *A History of Warfare* (London: Random House, Kindle Edition, 1993), 23, 436; John A. Lynn, “Dis-course, Reality, and the Culture of Combat,” *International History Review* 27, no. 3 (2005): 476.

² John A. Lynn, *Battle: A History of Combat and Culture* (New York: Basic Books, 2008), 366.

³ Keegan, *A History of Warfare*, 76.

⁴ Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (New York: Farrer, Straus and Giroux, 2021), 322.

There was a moment of optimism about this ideal and its apparent translation into reality at the turn of the century. Yet this optimism was soon tinged with a deep unease. Hopes for peace and civilized interventions⁵ were followed by decades of “endless war.”⁶ Violence persisted, both in more fantastical and more subtle forms: torture, beheadings, human shields, drone warfare, surgical strikes and global policing.

An impressive body of literature has emerged over the past couple of years that interrogates the development and deployment of the contemporary regime of war. In this review, I explore work by Moyn,⁷ Moses,⁸ Gordon and Perugini,⁹ Hirsch,¹⁰ Graf,¹¹ Meiches,¹² Mantilla,¹³ Levy,¹⁴ and van Dijk.¹⁵ I am afraid that it is impossible to do true justice to such a range of work, which encompasses a variety of subjects and methodologies. I hope, however, to draw out its contribution to an understanding of the current ethics of violence. Taken together, this literature covers the creation of the legal categories, the cultural values and the ethical concerns that shape the current regime. It shows how these laws and values are created through political and cultural negotiations and how they become, themselves, political mechanisms that erase or legitimize certain forms of violence. By doing so, these works reveal the contingency and dangers of the current paradigm of ethical violence. They also, I will suggest, show the difficulty of trying to escape from this paradigm.

The New Literature on the Ethics of Violence

All the works covered in this review unsettle the current paradigm of ethical violence by examining the construction of its various components. Francine Hirsch, Boyd van Dijk and Giovanni Mantilla do this by using extensive archival research to reveal the negotiations and compromises that shaped some of the most pivotal legal categories and rules of the contemporary regime of violence. Hirsch’s *Soviet Judgment at Nuremberg* focuses on the Nuremberg Trials. Hirsch shows the influence of Soviet thought and Soviet jurists on what is often depicted as the most fundamental moment in the liberal paradigm of international humanitarian law, international criminal law, and indeed the whole modern ethics of violence.

Van Dijk examines another pillar of the contemporary humanitarian order: the 1949 Geneva Conventions. Van Dijk focuses on the negotiations that shaped the rules which

⁵ See, for example, Keegan, *A History of Warfare*, 440–1.

⁶ A. Dirk Moses, *The Problems of Genocide: Permanent Security and the Language of Transgression* (Cambridge: Cambridge University Press, 2021), 478.

⁷ Moyn, *Humane*.

⁸ Moses, *The Problems of Genocide*.

⁹ Neve Gordon and Nicola Perugini, *Human Shields: A History of People in the Line of Fire* (Berkeley: University of California Press, 2020).

¹⁰ Francine Hirsch, *Soviet Judgment at Nuremberg: A New History of the International Military Tribunal after World War II* (Oxford: Oxford University Press, 2020).

¹¹ Sinja Graf, *The Humanity of Universal Crime: Inclusion, Inequality, and Intervention in International Political Thought* (Oxford: Oxford University Press, 2021).

¹² Benjamin Meiches, *The Politics of Annihilation: A Genealogy of Genocide* (Minneapolis: University of Minnesota Press, 2019).

¹³ Giovanni Mantilla, *Lawmaking Under Pressure: International Humanitarian Law and Internal Armed Conflict* (Ithaca, NY: Cornell University Press, 2020).

¹⁴ Yagil Levy, *Whose Life is Worth More? Hierarchies of Risk and Death in Contemporary Wars* (Stanford, CA: Stanford University Press, 2019).

¹⁵ Boyd van Dijk, *Preparing for War: The Making of the Geneva Conventions* (Oxford: Oxford University Press, forthcoming 2022).

are of the most interest in the humanitarian system: the protection of civilians; the regulation of civil and colonial conflicts; and the status of irregular combatants. Giovanni Mantilla also explores the diplomatic history of the regulation of internal armed conflict, but he does so over a longer period. He looks at the (limited) attention accorded to the issue before the Second World War and then provides detailed accounts of the negotiations behind the 1949 Geneva Convention's common article 3 and the 1977 Additional Protocols. The detail found in these three works provides an excellent resource for anyone interested in the legal and diplomatic history of international humanitarian law.

Moyn and Graf use a wider lens to explore categories and ideas that have achieved particular importance in the current paradigm of violence. Graf looks at what she describes as universal crime – crimes that injure humanity itself. Graf follows constructions of universal crime from Locke to the military interventions of the late twentieth century.¹⁶ Moyn investigates the very idea of humane warfare – an aim which he juxtaposes against attempts to outlaw war. Humanitarian warfare, Moyn shows, is an idea that has been toyed with since the nineteenth century, but only really took precedence as the dominant ethical paradigm in the late twentieth century.¹⁷

Meiches, Moses, Gordon and Perugini, and Levy focus on particular aspects of this paradigm of violence. Gordon and Perugini look at the function and problem of human shields in this paradigm, while Levy explores the ways in which democracies create hierarchies of death that come to legitimize the use of force against civilians. Meiches and Moses examine genocide – the archetypal crime in the current paradigm of violence. They show how genocide was first created, and then negotiated and renegotiated as a concept. They also reveal the more problematic aspects of these discourses and the political implications of genocide.

The Politics of Violence

The aim and effect of these works is to destabilize what is variously described as a “cosmopolitan,”¹⁸ “liberal”¹⁹ or “progressive”²⁰ account of the contemporary paradigm of violence. That is, an account that regards the current legal structures as enlightened, humanitarian, and progressive, and sees genocide and crimes against humanity as ahistorical, universal crimes that warrant intervention.²¹ The new literature disturbs this image by demonstrating the contingency of the current rules and concepts. It shows that these rules were created by particular actors, movements and discourses. As a result, it exposes the politics that inform the ethics of violence.

The straightforward historicization of the laws and values of the contemporary paradigm is an effective way of showing their contingency and political nature, even without any overt gloss. Hirsh's history of the Nuremberg Trials decentres the liberal, triumphant Western account simply by demonstrating the importance of Soviet jurists and Soviet thought in shaping the Nuremberg principles. *Soviet Judgment at Nuremberg*

¹⁶ Graf, *The Humanity of Universal Crime*, 113.

¹⁷ Moyn, *Humane*, 195.

¹⁸ Graf, *The Humanity of Universal Crime*, 113.

¹⁹ *Ibid.*, 3.

²⁰ Meiches, *The Politics of Annihilation*, 5.

²¹ *Ibid.*, 12.

replaces the traditional, Western fixation on Robert Jackson as the main protagonist of the trials with a detailed account of Trainin and Vyshinsky's motivations and contributions.²² Hirsh emphasizes that the Nuremberg principles were political as well as humanitarian; they were created, negotiated, and deployed for particular ends.²³ As Hirsch says: "The full story of Nuremberg confronts us with two awkward truths: illiberal authoritarian states have at times positively shaped international law, and international justice is an inherently political process."²⁴

The contribution of the Soviet Union to what is usually considered a liberal story of international humanitarian law is also noted by Mantilla and van Dijk.²⁵ Van Dijk argues that the Soviets were important in supporting some of the more protective elements in the 1949 Geneva Convention IV; he states that Pilloud later admitted privately that he "hardly dared to think what would have become of the Civilian Convention without the presence of [the Soviet] delegation."²⁶

Mantilla and van Dijk agree that the Soviet Union played a critical role in introducing common article 3 into the 1949 Geneva Conventions. Common article 3, which provides some minimal protection in non-international armed conflicts, is now regarded as an essential element of the structure of modern international humanitarian law.²⁷ While most Western states at the Diplomatic Conference sought to limit any recognition for colonial or civil wars, the Soviets pressed for their inclusion in the Geneva Conventions. The Soviet Union also sought to incorporate the principles of national self-determination and decolonization in the Conventions.²⁸ This approach may, Mantilla and van Dijk acknowledge, have been motivated by political considerations and a desire to encourage communist uprisings.²⁹ Yet, whatever the motivation, the Soviet strategy forced reluctant Western delegates to engage with the Soviet proposals.³⁰ Even the British delegation, which was the most opposed to the recognition of non-international conflicts, was sensitive to being regarded as "backward, decaying and legalistic."³¹ And, even though Western delegates ensured that the final article was deliberately ambiguous and limited in effect,³² Soviet pressure meant that there was a common article 3. This article, van Dijk states, would act as the herald for a legal revolution whose impact would grow, an asset for anti-colonial struggles and a guideline in modern terrorist conflicts.³³

The role of the Soviet Union is just one example of the general observation made by van Dijk and Mantilla: the drafting of the laws of armed conflict, including the humanitarian ones, is essentially a political process. Van Dijk emphasizes the messiness of the negotiations; this was not a reflective, scholarly process:

²² Hirsch, *Soviet Judgment at Nuremberg*, 18–35.

²³ *Ibid.*, 416.

²⁴ *Ibid.*, 8.

²⁵ Mantilla, *Lawmaking Under Pressure*, 84.

²⁶ van Dijk, *Preparing for War*.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Mantilla, *Lawmaking Under Pressure*, 84.

³⁰ *Ibid.*, 96.

³¹ *Ibid.*, 96.

³² *Ibid.*, 96.

³³ van Dijk, *Preparing for War*.

The drafting process resembled less an ivory tower, in which blueprints are conceived in splendid isolation, than a political arena, in which actors contemplate and struggle over different proposals and the stakes are often impossibly high.

Mantilla makes the point even more bluntly, describing international law as a product of politics in historical context.³⁴ The politics that Mantilla describes, however, are not just the interests of states. Rather, Mantilla's aim is to show how states are persuaded to adopt rules that do not appear to be in their interests. Mantilla uses methodologies from historical sociology and social psychology to explain this process.³⁵ He builds on the work by Keck and Sikkink on the naming and shaming strategies of transnational advocacy networks, to show the influence of social pressure and social opprobrium on the development of international law.³⁶ Mantilla adds to this approach a detailed examination of the peculiar dynamics within an insular diplomatic forum,³⁷ suggesting that shame created by diplomatic isolation increases the chances that those put under pressure will acquiesce to changes in the law – “albeit grudgingly and strategically.”³⁸ This is a fascinating and important contribution to the understanding of international law-making. And it shows, again, that the construction of international law can be a very human process,³⁹ and one influenced by the specific feelings and decisions of particular actors.

Thus, these detailed excavations of the archive emphasize the role of individual actors, compelled by personal, philosophical, and political motivations, in creating the provisions of international law. The other works in this body of literature are also extremely effective in showing that the concepts of ethical and criminal violence in the current paradigm are contingent and political, but they do so using different methodologies and sources. Many of these works emphasize the influence of philosophical, social and cultural discourses as well as the contribution of individuals. This can be seen in Moses and Meiches' work on genocide and Graf's account of what she calls “universal crime.”

As Graf's term “universal crime” makes explicit, the concept of genocide as the archetypal crime in the current paradigm is a particular, historically situated understanding of criminal violence. Graf and Moses show this through their accounts of alternative understandings of universal crime or, in Moses' words “languages of transgression.” Moses demonstrates that in the past, the language of transgression captured a much wider range of activities, including economic and political oppression.⁴⁰ Moreover, both Graf and Moses are able to show just how closely these standards are tied to their time and how poorly ideas of crime and ethical behaviour translate across historical periods. Graf does this by pointing out that Locke employed an idea of universal crime to justify English ownership of property in America,⁴¹ while Moses shows how population exchanges were linked to prevailing ideas of rights.⁴²

³⁴ Mantilla, *Lawmaking Under Pressure*, 17.

³⁵ *Ibid.*, 11.

³⁶ *Ibid.*, 18–19.

³⁷ *Ibid.*, 20, 34.

³⁸ *Ibid.*, 20.

³⁹ *Ibid.*, 20.

⁴⁰ Moses, *The Problems of Genocide*, 28.

⁴¹ Graf, *The Humanity of Universal Crime*, 49.

⁴² Moses, *The Problems of Genocide*, 46.

The emergence (and re-emergence) of the current idea of genocide is shown in Moses and Meiches' work to be a result both of politicized negotiations and then ongoing intellectual, cultural and political discourse. Meiches uses a Foucauldian genealogy to explain the development of the concept and he also draws on Deleuze and Guattari's theory of concepts as assemblages to explore the historical forces that have made genocide an influential term.⁴³ He traces disputes about the various elements of genocide, through a series of thematic studies. Moses takes a more linear approach, but he also shows how the concept of genocide was shaped within different epistemic systems, as well as by individuals.

Both Meiches and Moses note the role of Lemkin and the personal and intellectual background that inspired him to conceive of a crime of genocide.⁴⁴ This crime, in Lemkin's conception, was much broader and more subjective than later renderings. For Lemkin, genocide encompassed actions leading to the destruction of the national pattern of a group.⁴⁵ The group was variously described as a people bound together by imagined relations⁴⁶ or sharing a national spirit.⁴⁷ It was not, as Meiches says, an objective status.⁴⁸

The translation of Lemkin's crime of genocide into the United Nations Genocide Convention was, as these works show, the result of a contingent constellation of events and political manoeuvring. Moses argues that the restrictions placed on crimes against humanity at the Nuremberg trials meant that a coalition of religious organizations, thinkers and smaller states sought to find a way to criminalize such acts.⁴⁹ The creation of the United Nations provided a forum for this. In an interpretation that resonates with Mantilla's approach, Moses states that the great powers were ambivalent about genocide but did not want to be seen to thwart the United Nations consensus embodying "international conscience."⁵⁰ Instead, they engaged in negotiations to ensure that the Convention would not inhibit or delegitimize their own military or colonial practices.⁵¹

Thus, these works show that, as with the other foundational documents of the humanitarian paradigm, the codification of the Genocide Convention was influenced by political considerations.⁵² The result was a progressively more limited codification of the crime and its victims. In place of Lemkin's range of genocidal actions, the Genocide Convention was narrowed down, in Meiches' argument, to a "ban on killing."⁵³

The negotiations, as is well known, also limited the groups who could be victims of genocide to religious, national, racial and ethnical groups. Lemkin's conception of peoples was discounted, and linguistic, cultural and political groups were excluded.⁵⁴ Meiches notes that delegates asserted the importance of only protecting stable, "objective" groups – without justifying why these groups were considered to be objective.⁵⁵

⁴³ Meiches, *The Politics of Annihilation*, 22.

⁴⁴ Moses, *The Problems of Genocide*, 136.

⁴⁵ Meiches, *The Politics of Annihilation*, 46.

⁴⁶ *Ibid.*, 48.

⁴⁷ Moses, *The Problems of Genocide*, 18.

⁴⁸ Meiches, *The Politics of Annihilation*, 48.

⁴⁹ Moses, *The Problems of Genocide*, 222.

⁵⁰ *Ibid.*, 204.

⁵¹ Meiches, *The Politics of Annihilation*, 58; Moses, *The Problems of Genocide*, 204.

⁵² Moses, *The Problems of Genocide*, 204, 226.

⁵³ Meiches, *The Politics of Annihilation*, 116.

⁵⁴ *Ibid.*, 54–5.

⁵⁵ *Ibid.*, 58.

The result was to restrict the concept of genocide,⁵⁶ both politically and conceptually. It meant that if a state was carrying out a political action or responding to domestic opposition, its acts would not be considered genocide. Nor could a state's management of many minority groups be classified as genocide. Conceptually, it meant that genocide would be imagined as a racially inspired hate act that resembled the Holocaust.⁵⁷ The victims of genocide could not be political actors in any way; they would have to be innocent and agentless victims.⁵⁸

Both Moses and Meiches note that the idea of genocide receded in political discourse soon after the conclusion of the Genocide Convention. Then ...

[B]eginning in the 1970s, a series of changes prompted a resurgence of the concept of genocide. These changes included, but are not limited to, the rise of human rights rhetoric, the growth of media and visual imagery surrounding mass violence, fears about state power during the cold war, and the development of consciousness about the Nazi genocide.⁵⁹

With the resurgence of the concept of genocide came renewed discussion about the elements, meaning and application of genocide. Moses emphasizes the importance of intellectual and cultural movements in re-establishing conceptual parameters for genocide as the crime of crimes. He looks at the role of philosophers like Sartre and Arendt,⁶⁰ and the academic work in the field of Genocide Studies.⁶¹ Meiches examines ongoing disputes over the elements of genocide. For example, he shows how the "stable" groups introduced by the Genocide Convention have been reconceptualized in academic and legal contexts in constructivist⁶² and accretive⁶³ approaches. This resurgence and development of genocide reaffirms that genocide is a contingent and changeable concept. Moreover, it shows that the contemporary focus on the battle against genocide as part of a "moral international order"⁶⁴ is itself contingent and dependent on the current humanitarian paradigm – as well as being an essential part of that paradigm.

Moyn demonstrates the contingency of this paradigm as a whole by juxtaposing the humanitarian paradigm against the history of the peace movement. He shows that for a long time, aggressive war itself was considered to be the problem.⁶⁵ The most ethical approach was not to make war humane but to prohibit war itself. Moyn shows the dangers of the humanitarian ideal by letting historical figures, such as Tolstoy and Moynier, speak their distrust of "humane" warfare.⁶⁶ Tolstoy, Moyn says, devoted most of his energy to the different proposition that making war humane could court the risk of endless war and, above all, cover up its horrors.⁶⁷

Moyn documents a cultural transformation towards humanitarianism and humane war in the 1990s. He refers to the work of historian and writer Samuel Hynes, who noted that the prototypical story about war had shifted from a story about fighters to a story about

⁵⁶ Ibid., 42.

⁵⁷ Moses, *The Problems of Genocide*, 204.

⁵⁸ Ibid., 484.

⁵⁹ Meiches, *The Politics of Annihilation*, 60.

⁶⁰ Moses, *The Problems of Genocide*, 423.

⁶¹ Ibid., 462.

⁶² Meiches, *The Politics of Annihilation*, 60.

⁶³ Ibid., 64.

⁶⁴ Ibid., 118.

⁶⁵ Moyn, *Humane*, 171.

⁶⁶ Ibid., 27.

⁶⁷ Ibid., 36.

the helpless and innocent.⁶⁸ Alongside this cultural shift, Moyn notes that activists, international lawyers, and the military also began to focus on the innocent victims of warfare.⁶⁹ The legal agenda was soon engrossed with the suffering of innocents.⁷⁰ Even the defense community and military lawyers “agreed to occupy themselves with something called ‘international humanitarian law’.”⁷¹ These different groups converged to humanize the permissive laws of war.⁷² In this way, Moyn demonstrates that the aspiration for humane war is not a universal or unproblematic goal. Rather it is part of a specific and historically located cultural movement.⁷³

The humanitarian paradigm aspires to protect human life. Yet, as Gordon and Perugini and Levy show, even the concept of a valuable life is shaped by political, legal and cultural discourses. Gordon and Perugini use the figure of the human shield to show how different forms of life are regarded as valuable in different periods. For, example the Prussians in the Franco-Prussian war used people of a certain social class and status as human shields, because they were considered valuable.⁷⁴ In the humanitarian regime, ISIS uses defenceless civilians, in the hope that the value given to the innocent human shields would protect them.⁷⁵ As Gordon and Perugini state, the “seemingly neutral term *human*” in human shields is not a universal biological condition but a political one.⁷⁶ It is constituted through social and political hierarchies.

Levy examines the way different lives are ascribed distinct value, even within a humanitarian regime. He argues that democracies create “death hierarchies,” through which they allocate risk either to their combatants or enemy civilians. Levy states that while military variables play a role in this process, the most important factors are the legitimacy of the use of force and the legitimacy of sacrifice within a society.⁷⁷ These legitimacies are created, Levy shows, by socially constructed norms, symbols, values and beliefs,⁷⁸ and he exposes the contingency of these norms by demonstrating a cultural shift away from a legitimacy of sacrifice in the 1970s and 1980s.⁷⁹ The growing sensitivity to military casualties led, Levy argues, to a greater willingness to redirect risk to enemy civilians.⁸⁰ This willingness might seem incongruous in a humanitarian regime, but Levy shows how the same discourses that promote humanitarian values can also devalue adversaries who are connected with non-liberal values.⁸¹

The Politics of Law

Thus, this literature clearly shows that the concepts and provisions of the laws of armed conflict, or international humanitarian law are contingent, and shaped by political

⁶⁸ *Ibid.*, 193–4.

⁶⁹ *Ibid.*, 195, 228, 296.

⁷⁰ *Ibid.*, 220.

⁷¹ *Ibid.*, 195.

⁷² *Ibid.*, 195.

⁷³ *Ibid.*, 196.

⁷⁴ Gordon and Perugini, *Human Shields*, 29.

⁷⁵ *Ibid.*, 5.

⁷⁶ *Ibid.*, 5.

⁷⁷ Levy, *Whose Life Is Worth More?* 13.

⁷⁸ *Ibid.*, 13.

⁷⁹ *Ibid.*, 61.

⁸⁰ *Ibid.*, 38.

⁸¹ *Ibid.*, 20.

considerations. It also shows that these categories themselves have a political effect. The divisions between acceptable and unacceptable violence have an important role in shaping how humanity is understood, what forms of life are considered “grievable,”⁸² and what political actions can be taken for and against life.

Genocide provides one of the clearest illustrations of this. As Graf writes, the notion of universal crime shapes our vision of mankind via the kinds of subjectivities, forms of agency, and relationships of authority that the concept entails.⁸³ Moses and Meiches show that the specific legal and conceptual parameters of genocide have affected the way events and people are understood and described. Sometimes these redescriptions are done strategically because whether an event can be understood as genocide or not has political implications; genocide facilitates empathy and intervention in a way that other political violence does not.⁸⁴ It is not always, however, a deliberate manoeuvre. Rather, these narratives often reveal an acceptance and reiteration of particular ways of seeing people and events.

For example, the restriction of genocide to racial, religious, national and ethnic groups makes these powerful categories in global politics and “constitutes them as standards for the expression of threatened identity.”⁸⁵ It becomes conceptually and politically important to be able to depict a victim group in a way that falls into one of these categories. When this is done repeatedly, such groups are afforded a status and a stable reality – even while the stability of such groups is problematic. In Meiches and Moses’ words, these terms are reified by making them essential to the regime of sense governing genocide.⁸⁶

Moreover, the legal construction of genocide in terms of a depoliticized, racially motivated attack, together with the cultural prominence of the Holocaust as the archetypal genocide,⁸⁷ means that events and people are stripped of their political aspect to fit into the parameters of genocide. This has the effect of distorting and simplifying historical narratives and the understanding of current events.⁸⁸ Even the Jewish holocaust, Moses shows, is capable of a political reading.⁸⁹

These depoliticized narratives also distort the way that victims are understood. Victims have to be presented as innocent victims, in the way that the Jews of the Holocaust are perceived.

Whether Jewish or Christian, or both, this image of the exemplary victim has proven irresistible to those seeking recognition as innocent victims of persecutions who deserve protection and/or compensation. Victims of various conflicts routinely construct themselves as Jews: killed for their identity rather than for their deeds, likewise virtuous martyrs.⁹⁰

This presentation shapes a particular view of victims, and an assessment of value in terms of innocence. As we will see, this idea of the innocent victim brings its own conceptual problems, but the political repercussions of this emphasis on innocence can be seen in

⁸² Ibid., 39, and Meiches, *The Politics of Annihilation*, 40, quoting Judith Butler.

⁸³ Graf, *The Humanity of Universal Crime*, 7.

⁸⁴ Meiches, *The Politics of Annihilation*, 40.

⁸⁵ Ibid., 59.

⁸⁶ Moses, *The Problems of Genocide*, 272; Meiches, *The Politics of Annihilation*, 41.

⁸⁷ Moses, *The Problems of Genocide*, 453.

⁸⁸ Ibid., 29.

⁸⁹ Ibid., 305–15.

⁹⁰ Moses, *The Problems of Genocide*, 487.

Gordon and Perugini's work, which shows how the categories of innocence make the use of human shields a viable political strategy. Shielding, they argue, is part of a politics of human vulnerability – “a form of politics in which vulnerability is used as a strategy to achieve a range of political, military and legal gains.”⁹¹ The response to this strategy is also shaped by assessment of the victims' value – as Gordon and Perugini show, a human shield is only effective if the shield is considered to have political value. Currently, this value is ascribed to the innocent, but it has been ascribed to other groups in the past.⁹²

Indeed, innocent victims have so much political weight in this system that it is possible to wage “good” wars on their behalf,⁹³ when they are threatened by the universal crimes recognized by this paradigm.⁹⁴ At the same time, however, actions that are not considered crimes in the paradigm will not be redressed, and victims who cannot be described as innocent will not be protected. Moses' *The Problems of Genocide* shows, convincingly, the array of violent political actions that have been allowed and justified by a system that will only protect a few depoliticized groups. Those who are not innocent become acceptable targets.

The Violence of Humanitarian Ethics

It is this political power inherent in the humanitarian paradigm – the power to create groups and justifications that facilitate and legitimize violence – that is the principal source of discomfit within this body of literature. A number of these works argue that the humanitarian project justifies certain types of violence, in particular: imperial violence; ongoing and obscure forms of violence; and violence against the same innocent people that the humanitarian system is intended to protect.

Imperial Violence

The relationship between international law and Western imperialism is a story that has been authoritatively told enough to become a widespread understanding of the discipline. These works add to that understanding through detailed accounts of the development and implementation of the provisions of international humanitarian law – although they also complicate the story a little.

It is generally acknowledged in this literature that, as Moyn writes, for “most of its history, international law was generally in tune with imperial and increasingly racialized projects.”⁹⁵ “International law” was shaped, from its early renderings in the context of Spanish imperialism up until the modern laws of armed conflict, by imperialist concerns and ideas. Moyn notes that Martens, famed for introducing the principle of humanity into the Hague Convention, had stated that “Muslim peoples and pagan and savage tribes” were not admitted to the society of nations, or covered by international law ...⁹⁶

⁹¹ Gordon and Perugini, *Human Shields*, 6.

⁹² *Ibid.*, 29.

⁹³ Levy, *Whose Life Is Worth More?* 21–3.

⁹⁴ Graf, *The Humanity of Universal Crime*, 3.

⁹⁵ Moyn, *Humane*, 94.

⁹⁶ *Ibid.*, 94.

Moreover, as the diplomatic histories of the 1949 Geneva Conventions relate, the creation of modern humanitarian law took place on a “remarkably uneven playing field.”⁹⁷ Mantilla and van Dijk show that the British and French, in particular, acted to protect their colonial empires and prerogatives, fighting to prevent the extension of belligerent rights to those who might oppose imperialism. To a large extent, they were successful; the majority of states continued to consider international law inapplicable to colonial wars, thereby excluding colonized people from any protection that might be available.⁹⁸ In a similar way, Moses and Meiches argue that the Great Powers shaped the elements of genocide in a way that prevented any challenge to their sovereignty and colonial empires.⁹⁹ The result was that “liberal permanent security measures” could be taken against indigenous peoples.¹⁰⁰ Indeed, as Moses shows, when indigenous people tried to resist violence, it became a pretext for genocide.¹⁰¹

Yet, as these accounts also show, this exclusion was not complete nor uncontested. The efforts of the Soviet Union, which have already been discussed, were aimed at the incorporation of principles of national self-determination and decolonization into the Geneva Conventions.¹⁰² The Soviet Union did not achieve this, but the inclusion of common article 3, however ambiguous, did become, in van Dijk’s words, a weapon for anti-colonial movements.¹⁰³ Van Dijk also shows that, even within delegations, there was a difference of opinion on imperial positions:

Some drafters were outspokenly anti-imperialist, struggling against efforts to perpetuate European colonial rule. Others became deeply involved in maintaining empire by associating themselves with proposals that sought to defend colonial sovereignty.¹⁰⁴

Moreover, the 1977 Additional Protocols, which, I would argue, provide the real legal foundation for the current humanitarian paradigm,¹⁰⁵ were visibly influenced by anti-colonial thought and interests.

There are, however, more direct and more subtle ways in which imperialism informs the implementation and understanding of international law. As Moyn points out, even when the laws may not have been drafted to explicitly exclude global peoples, they were clearly different in spirit and practice when it came to counterinsurgent and colonial war.¹⁰⁶ The value of different people, and therefore the readiness to protect or attack them, is often determined through a racist lens.¹⁰⁷ Gordon and Perugini show this in terms of human shields, arguing that there was little use of human shields in anti-colonial uprisings, because the lives of indigenous people were not regarded as valuable enough to deter attacks.¹⁰⁸

Moreover, cultural discourses affect the perception of violence and its victims. Moses and Meiches argue that the discourses around genocide have had the effect of disguising

⁹⁷ van Dijk, *Preparing for War*.

⁹⁸ Gordon and Perugini, *Human Shields*, 81.

⁹⁹ Meiches, *The Politics of Annihilation*, 58; Moses, *The Problems of Genocide*, 225.

¹⁰⁰ Moses, *The Problems of Genocide*, 46.

¹⁰¹ *Ibid.*, 252.

¹⁰² van Dijk, *Preparing for War*.

¹⁰³ Levy, *Whose Life Is Worth More?* 39.

¹⁰⁴ van Dijk, *Preparing for War*.

¹⁰⁵ Amanda Alexander, “A Short History of International Humanitarian Law,” *European Journal of International Law* 26, no. 1 (2015): 109.

¹⁰⁶ Moyn, *Humane*, 96.

¹⁰⁷ *Ibid.*, 168.

¹⁰⁸ Gordon and Perugini, *Human Shields*, 81.

certain forms of liberal violence in colonial settings.¹⁰⁹ Meanwhile, narratives about the association between non-democratic regimes and international crimes make violence more visible in other settings.¹¹⁰ The same narratives present the objects and perpetrators of violence as helpless victims and dehumanized, satanic aggressors.¹¹¹ As a result, intervention starts to appear as an ethical response.

Endless War and Global Policing

These interventions are the most obvious way in which international law continues to play out its imperial function. The crimes established by the humanitarian paradigm legitimize interventions aimed at rescuing innocent victims.¹¹² These victims are perceived through an imperialist lens as “subject,” non-Western women who can “only feel pain and who are bereft of agency.”¹¹³ The interventions are carried out by “Western coalitions” against non-western states¹¹⁴ or, more specifically, by the United States,¹¹⁵ taking up Britain’s mantle, in an imperial “war on terrorism.”¹¹⁶

The result, as described in this literature, is an endless war, unconstrained in spatial or temporal reach.¹¹⁷ The reimagination of these wars as global policing,¹¹⁸ global law enforcement¹¹⁹ or, in Moses’ term, “permanent liberal security,” suggests both the interminable nature of these operations and their unprecedented and intimate reach. Moyn argues that this form of war *is* more like policing; that it is less traditionally violent and increasingly protective of both civilian and combatant.¹²⁰ This does not, however, make it any less oppressive for Moyn. Indeed, he suggests that the increasing humanity with which these interventions are carried out makes them more legitimate, and therefore more pervasive.¹²¹ For the most part, however, this literature argues that endless war enables traditional as well as new forms of violence – in particular, the legal killing of civilians in the name of humanity.¹²²

The Suffering of the Innocent

Thus, despite Moyn’s insistence that the real problem with war is war itself, for the most part these works suggest that their principal concern with the current paradigm of violence is that it continues to allow for civilian suffering. Universal crimes facilitate coercive action to save civilians which then, as Graf writes, “injures and destroys even as it purports to save and protect.”¹²³ Levy shows how even wars which are initiated to protect civilians result in civilian deaths. A campaign might begin with strict rules

¹⁰⁹ Moses, *The Problems of Genocide*, 46; Meiches, *The Politics of Annihilation*, 99.

¹¹⁰ Meiches, *The Politics of Annihilation*, 99.

¹¹¹ Levy, *Whose Life is Worth More?* 93.

¹¹² Moses, *The Problems of Genocide*, 478; Graf, *The Humanity of Universal Crime*, 124.

¹¹³ Moses, *The Problems of Genocide*, 491–2.

¹¹⁴ Graf, *The Humanity of Universal Crime*, 113.

¹¹⁵ See, for example, Moyn, *Humane*, 321.

¹¹⁶ Moses, *The Problems of Genocide*, 499–500.

¹¹⁷ *Ibid.*, 478.

¹¹⁸ Moyn, *Humane*, 323.

¹¹⁹ Graf, *The Humanity of Universal Crime*, 124.

¹²⁰ Moyn, *Humane*, 322.

¹²¹ *Ibid.*, 294.

¹²² Moses, *The Problems of Genocide*, 440, 501.

¹²³ Graf, *The Humanity of Universal Crime*, 165.

and clear intentions to protect civilians, but the rules are gradually loosened to allow for civilian casualties.¹²⁴

It is also argued that the current conceptualization of international crimes and their victims allows for more civilians to be killed. People who cannot be depicted as innocent, depoliticized civilians, are exposed to danger. Gordon and Perguni show how the use of the civilian as a political tool exposes human shields to violence; innocence is a qualification for protection that too easily becomes a disqualifier.

Moses argues that the emphasis on genocide as a depoliticized crime against innocent victims legitimizes violence against other civilians. If an act can be represented as politically motivated or directed at political agents, once it is an act of “permanent security,” it is no longer seen as criminal or horrific. The focus on depoliticized genocide and its innocent victims, Moses argues, therefore allows for violence against other civilians. Some of these civilians, Moses says, will still be innocent and deserving of protection.¹²⁵

Levy, like Moses, argues that when civilians are seen as political agents, citizens who support or should resist their state, they can be targeted.¹²⁶ Moreover, when their state is considered the purveyor of international crimes, the humanitarian paradigm has the effect of dehumanizing and delegitimizing the opposition in a way that particularly sanctions the killing of civilians.¹²⁷ Levy concludes that the West could do a better job of protecting non-combatants.¹²⁸

The Humanitarian Trap

Not all of the works reviewed have a normative aspect. Yet, as these comments show, where there is a normative argument it still often has a humanitarian aspect – if by humanitarian we mean a law aimed at preventing the suffering of the innocent. This is the case even in those studies which question and critique the humanitarian paradigm. The only real exception to this is Moyn’s *Humane*, which eschews any humanitarian solution and questions the focus on the innocent. The other critiques by Levy, Moses, Gordon and Perguni do, as we have seen, also problematize the idea of innocence. Indeed, it is generally agreed that the idea of the innocent, endangered civilian is a contingent, constructed, concept. Moreover, the innocent civilian is described as one of the most foundational concepts in the current regime of violence and deeply implicated in its problems. Nevertheless, alongside their critique, these works continue to advocate for the protection of the innocent and to assess the rules of the system against their ability to protect the innocent. To this extent, even this critical literature continues to reaffirm the values and concepts of the humanitarian paradigm. In doing so, it both demonstrates and extends the ethical and epistemological trap that the humanitarian emphasis on innocence has created. Indeed, it shows that this trap is so formidable and escaping it requires such a radical – and often distasteful – move, that it is hard to acknowledge its real implications.

¹²⁴ Levy, *Whose Life Is Worth More?* 1.

¹²⁵ Moses, *The Problems of Genocide*, 274.

¹²⁶ Levy, *Whose Life Is Worth More?* 145.

¹²⁷ *Ibid.*, 2, 145–6.

¹²⁸ *Ibid.*, 239.

One of the features of this trap, which is shown in this literature, is an unwillingness to accept the implications of the complexity of conflict and the true nature of the laws of conflict even while it is being discussed. Civilians in many conflicts are not apolitical – as these works repeatedly show. Their agency may be limited by social roles, cultural norms, political, economic and epistemological structures. But this would also apply to the combatant. Who is to say that the citizen who supports her state has less agency than a conscript, or even a soldier who volunteers because of a lack of other opportunities or social pressure? To make this statement is extremely objectional in the current paradigm. Yet the fact that the soldier poets of the First World War were prepared to say this, angrily, about the civilians who they perceived as the political supporters of the carnage,¹²⁹ shows that different ethical perspectives are possible. Indeed, this complexity is not an ethical problem in a context where the potential agency and dangerousness of civilians is acknowledged culturally and legally. The political civilian can be simply reinscribed as a threat and a target. It *only* becomes a trap, this infinite loop of humanitarian anticipation, disappointment and renewal, when international law is seen as a project that is aimed at protecting civilians and civilians are seen as innocents.

For example, Gordon and Perugini give many examples of voluntary human shields, including activists in Palestine, like Rachel Corrie, who thought their political status would stop Israel demolishing homes.¹³⁰ Moreover, they show that even involuntary human shields are chosen because they have political value. Nevertheless, Gordon and Perugini present this mixture of innocence and politicization as a conceptual problem and a challenge to the law of war's basic structure and logic, which, they state, is based on the possibility of distinguishing between combatants and noncombatants.¹³¹ They argue that the laws of war have trouble dealing with civilians who are active in armed conflict, especially those who act to protect other civilians.¹³²

I would respectfully suggest human shields do not fall outside the law. Rather this is an example of a situation where the law exists, but it is hard to acknowledge because it is so unsavoury if viewed from a humanitarian perspective.¹³³ I would also suggest that human shields are only really a conceptual problem for the law when the main purpose of the laws of war is considered to be the protection of civilians.

My argument would be that the overriding theme in the laws of war has never been to protect "innocent" civilians, but to make sure that the state has a monopoly over violence and political action. The laws of armed conflict have traditionally operated to divide people into two depoliticized roles. On the one side, combatants, who comply with the directions of his state or a military leader, rather than asserting their own political agency. On the other, civilians, who refrain from "direct participation in hostilities." Civilians are not protected because they are innocent; rather, they are not deliberately targeted or punished while they remains passive.

¹²⁹ Amanda Alexander, "The 'Good War': Preparations for a War Against Civilians," *Law, Culture and the Humanities* 15, no. 1 (2019): 227.

¹³⁰ Gordon and Perugini, *Human Shields*, 5.

¹³¹ *Ibid.*, 8.

¹³² *Ibid.*, 8.

¹³³ Amanda Alexander, "International Humanitarian Law, Postcolonialism and the 1977 *Geneva Protocol I*," *Melbourne Journal of International Law* 17, no. 1 (2016): 23.

This reading of the laws of war has been clarified and informed by these excellent critiques of the development of the humanitarian paradigm. As Moyn shows, early codifications of the law of war did not focus on humane treatment of civilians.¹³⁴ Gordon and Perugini, looking at the drafting of the Geneva Conventions, state that:

The civilian was defined as a person who is passive in the political arena. Any political activity could be framed as contributing to the war effort of the opposing side, which would lead to the loss of protections that the convention bestows on civilians. Hence, at the very moment that civilians were given numerous protections and their lives were considered more valuable, the notion of civilianhood was deflated, potentially exposing politically active civilians to lethal violence.¹³⁵

Mantilla's research demonstrates how important the state's monopoly on violence has always been; he describes how any suggestion that there might be a right to resist oppression was dispensed with quickly in the UN human rights debates of the 1940s.¹³⁶ The desire to protect state sovereignty and the state's control of violence also meant an unwillingness to address internal atrocities.¹³⁷ It can also be seen in Western delegations' insistence that it was entirely inappropriate to acknowledge motivations in international humanitarian law – a step which would mean acknowledging the right of national liberation movements and oppressed peoples to fight.¹³⁸

This discursion may have done no more than to repeat what has already been shown so well in this literature – that the laws of war were not written to protect innocent civilians and, predictably, do not succeed in doing so. Yet the frequent return to innocence, despite these acknowledgements, shows the trap of humanitarian thinking – an ethical loop that returns again to the reification of a system and values that are problematic. Moreover, it is problematic not just for its political potential, but for its more philosophical implications – which is also well explored in this literature. The unwillingness to recognize people's political agency can also be troubling. So too is the ex post facto erasure of political actors and their re-inscription as innocents requiring protection. As Moses shows, the insistence of innocence distorts the presentation and historical memory of atrocities and their victims. Moses' description of the exemplary innocent victims, the scapegoat, the sacrifice, the "subject", non-Western women who are bereft of agency¹³⁹ – demonstrates that these are problematic images of humanity. Moyn adds to this disturbing image, drawing on Tolstoy to suggest that humane warfare treats its subjects as passive slaves under kind and gentle direction.¹⁴⁰

Thus, reinscribing civilians as innocents and insisting on civilian protection create empirical and conceptual problems. And yet, this process is still continued even in some of the more critical accounts of the humanitarian paradigm. I would suggest that this is because while there are possibilities of escape from the humanitarian loop, the same paradigm makes them too unsavoury or too radical to acknowledge easily. For example, a return to the idea that civilians may be political, potentially dangerous, and

¹³⁴ Moyn, *Humane*, 30.

¹³⁵ Gordon and Perugini, *Human Shields*, 83.

¹³⁶ Mantilla, *Lawmaking Under Pressure*, 2.

¹³⁷ *Ibid.*, 10, 82–3.

¹³⁸ *Ibid.*, 145.

¹³⁹ Moses, *The Problems of Genocide*, 491–2.

¹⁴⁰ Moyn, *Humane*, 322.

therefore a legitimate target of military action is unspeakable – at least in this kind of literature. Rather, this literature seems to aspire towards a different kind of system – but still one which it finds hard to articulate directly. This would be a system where there are greater limitations on state action and increased protection of an active civilian. This vision is surely implied in Levy and Gordon and Perugini’s emphasis on protection for civilians who they acknowledge have political agency. Moses, too, suggests that a state’s scope of political action for permanent security should be limited; the state, he says, should only be allowed to carry out “legitimate” political actions against political enemies. This proviso, and the emphasis on civilians, undercuts the radical implications of the suggestion – but it still tends towards a vision of system where states have less power and civilians have more scope for action.

Moyn’s work is the most upfront about the radical ethical and political change required – probably because he casts off the comforts of humanitarianism altogether. Moyn suggests that a renewed emphasis on the evil of war itself and the proscription of state intervention, even in its most humane forms, would be a more ethical approach. The result, he says, would be “a law that not only tolerates less pain, but also promotes more freedom.”¹⁴¹

Caught, myself, in the humanitarian trap, I find it hard to imagine what this freedom looks like and what it means. It suggests a freedom from interventions, from Western policing and norms. But is this then freedom for other forms of violence? Perhaps it would even require other forms of violence or action, if potential victims have to act to protect themselves in the absence of humanitarian sanctioned interventions? The overall effect suggests a system that would be less concerned with protecting the innocent than with breaking the state monopoly on violence. This would lead to a very different understanding of law than that envisaged by the traditional laws which guaranteed state power and obedient civilians/soldiers or the equally pacific humanitarian vision of protection. Once we acknowledge this difference though, it is still necessary to ask: What kind of world would this be? And what kind of new ethics of violence would it usher in?

Conclusion: Towards a New Ethics of Violence?

One of the important things this body of work shows, whether explicitly or not, is that there is always going to be some system, some ethics of violence. Even the most generous assessment of the humanitarian order, or an order based on law, reveals violence. As Graf says, Habermas’ vision of a cosmopolitan society, where war is superseded by “legal pacifism” would still have to reckon with the violence that enforces the cosmopolitan order.¹⁴² In a similar manner, Moyn argues that the most restrained, automated system of warfare that could be imagined would still be a tool of power and violence.¹⁴³ Even where global policing can be considered humane, it is still oppressive.

The concern with global policing, which ties in with the unease about pacification, seems to me to express an almost Foucauldian distaste for the hidden repressions of liberal society. This impression is reinforced by other reminders of Foucauldian thought

¹⁴¹ *Ibid.*, 325.

¹⁴² Graf, *The Humanity of Universal Crime*, 161.

¹⁴³ Moyn, *Humane*, 323–4.

in this literature. The cumulative examples of the way in which discourse and epistemic systems shape a paradigm of violence, the identities and concepts it depends on, bolster a Foucauldian vision of the world.

Perhaps the most disheartening observation in the Foucauldian vision is the idea that systems of knowledge and power can supersede each other but cannot be escaped.¹⁴⁴ If the current “humanitarian” paradigm of violence came to an end, it would be replaced by a new paradigm or paradigms of violence that would have their own values and dangers. If the dilution of state power was achieved, it would create space for other relationships of power that might be more empowering but are (possibly) just as frightening to comprehend. As Moyn himself says:

worry that with better can also come worse, not because improvement is a lie but because there is no single arc to the moral universe that guarantees that progress comes without regress on other fronts.¹⁴⁵

Thus, this literature is extremely useful in the way that it shows that the humanitarian system is a paradigm of ethical violence, which is constructed and contingent. Moreover, it clearly demonstrates how problematic the paradigm is; it reveals the way it enables and conceals particular forms of violence. This literature also, however, shows how encompassing this paradigm is – how hard it is to escape from humanitarian values and arguments. Yet, if we could escape from the problems and snares of the humanitarian paradigm, what new traps would await?

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Notes on Contributor

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¹⁴⁴ Michel Foucault, *The Will to Knowledge: The History of Sexuality: Volume One* (London: Penguin Books, 1998), 93–6, 138–9.

¹⁴⁵ Moyn, *Humane*, 321.